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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1136

U.S. INDUSTRIES, INC., ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–9; R. 201) is not yet reported. The district court did not file a written opinion; its order (R. 120) is unreported.

JURISDICTION

The order of the court of appeals was entered on April 7, 1965. The petition for a writ of certiorari was filed on May 6, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

In connection with certain criminal antitrust cases, the government filed, and the district court ordered

sealed, a pre-sentencing memorandum which contained material protected by grand jury secrecy. The question presented is whether the courts below properly released the memorandum to private plaintiffs in treble-damage suits against the same defendants when the memorandum had already been disclosed to defense counsel in the course of sentencing, the criminal cases had been completed, and the court of appeals deleted the portions of the memorandum whose disclosure would reveal the identity of grand jury witnesses.

RULE INVOLVED

Rule 6(e) of the Federal Rules of Criminal Procedure provides, in part:

> *Secrecy of Proceedings and Disclosure.* Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. * * *

STATEMENT

Petitioners are corporations and corporate officers, who were convicted of violations of Section 1 of the

Sherman Act (15 U.S.C. 1), upon their pleas of *nolo contendere;* and individuals who allege that they testified before the grand jury which returned the five indictments resulting in such convictions (Pet. App. 1). The indictments charged conspiracies to allocate orders and to rig bids for products of the concrete and coated-steel-pipe industry (Pet. 4).

In connection with sentencing, the government prepared a "Memorandum of Government Relating to the Imposition of Sentences and Fines," which was attached to the pre-sentencing report of the probation office (Pet. 5–6). The memorandum, although not a grand jury document, contained information protected by the policy of grand jury secrecy under Rule 6(e) of the Federal Rules of Criminal Procedure. It was made available to and read by the attorneys for the defendants in the criminal cases, and was filed under seal (Pet. App. 2, 7).

In the meantime, six treble-damage suits had been filed against defendants who were also defendants in the criminal cases, alleging injuries from violations of the Sherman Act involving activities encompassed within the criminal indictments. After conclusion of the criminal cases, the plaintiffs in these treble-damage suits sought access to the government pre-sentencing memorandum by subpoenas addressed to government counsel. Judge Stephens transferred the matter to Judge Harry C. Westover before whom the civil antitrust cases were pending. Judge Westover ruled that the order sealing the government memorandum should be vacated and the subpoena quashed (R. 186–187, 190); and on October 6, 1964, an order was entered

to that effect (R. 120).[1] The Court of Appeals for the Ninth Circuit affirmed the district court order after deleting parts of the memorandum, denying petitioners' application for writs of prohibition and mandamus.

While the Ninth Circuit recognized that disclosure of grand jury material should be permitted only upon a showing of "particularized and compelling need," it also noted that the justification for disclosure must be assessed in light of the particular facts of the case and their relation to the reasons for grand jury secrecy. Since the criminal case was over, the only particular "compelling reason" for secrecy was to encourage untrammeled testimony of future grand jury witnesses (Pet. App. 5–7). Supporting disclosure was the fact that the defendants had already enjoyed the opportunity to inspect the memorandum, and it would be "highly inequitable and adverse to the principles of federal discovery to allow one party access to a government document and not the other" (Pet. App. 9). In these circumstances, the court of appeals held that the district court could properly

[1] The proceedings below followed the course used in *Olympic Refining Company* v. *Carter*, 332 F. 2d 260 (C.A. 9), certiorari denied, 379 U.S. 900. The private plaintiffs served a deposition subpoena *duces tecum* on Stanley E. Disney, Chief of the Los Angeles Office of the Antitrust Division, and the government responded by filing a motion before Judge Stephens asking that the sealing order be modified to grant the private plaintiffs access to the government memorandum and to quash the subpoena duces tecum (R. 44, Pet. App. 2–3). The private plaintiffs joined in the government's motion to permit disclosure of the memorandum and filed supporting briefs (R. 55–62).

grant disclosure of the contents of the pre-sentencing memorandum, so long as it took steps, by deleting witnesses' names or by other means which would maintain their anonymity, to protect the policy of grand jury secrecy. In this matter of first impression, the court of appeals took the appropriate action itself, deleting portions of the government memorandum and returning excised copies to the district court for filing, without seal, after retaining one copy of the original document in its own files (Pet. App. 8).

ARGUMENT

Disclosure of excised copies of the government pre-sentencing memorandum to treble-damage plaintiffs was a proper exercise of judicial discretion on the particular facts of the case where the memorandum had already been disclosed to the defendants' counsel. Further review is not warranted.

1. Rule 6(e) of the Federal Rules of Criminal Procedure, which embodies the rule that grand jury testimony is confidential (*United States* v. *Procter & Gamble Company*, 356 U.S. 677; *Pittsburgh Plate Glass Company* v. *United States*, 360 U.S. 395), allows disclosure "when so directed by the court preliminarily to or in connection with a judicial proceeding."[2] For "after the grand jury's functions are

[2] This is the provision governing initial disclosure to the criminal defendants, or members of the public. As discussed, *infra*, pp. 7–8, Rule 6(e) specifically provides in its first sentence for disclosure without the need for leave of court "to the attorneys for the government for use in the performance of their duties."

ended, disclosure is wholly proper when the ends of justice require it." *United States* v. *Socony-Vacuum Oil Company,* 310 U.S. 150, 233–234.[3] But such disclosure requires a showing of particularized, compelling need. *United States* v. *Procter & Gamble Company, supra; Pittsburgh Plate Glass Company* v. *United States, supra.* While most cases deal with disclosures sought by criminal defendants, the same standard must be met when disclosure is sought by private parties seeking to use the material in civil suits against the criminal defendants.[4]

2. Here private plaintiffs asserted a need based upon prior disclosure of the same material to the counsel for the criminal defendants in the course of the criminal cases. A number of these defendants are subject to pending civil suits, arising from the same conduct which was the basis for the criminal convictions. As the court below pointed out, it would be "highly inequitable" not to grant private adversaries equal access to the government document (Pet. App. 9). We believe that "the ends of justice" (*United States* v. *Socony-Vacuum Oil Company,* 310 U.S. at 234) sup-

[3] See *Pittsburgh Plate Glass Company* v. *United States,* 360 U.S. at 399; *In re Grand Jury Proceedings,* 309 F. 2d 440, 444 (C.A. 3); *Herzog* v. *United States,* 226 F. 2d 561, 566 (C.A. 9). See also Wigmore, *On Evidence,* McNaughton Revision, Vol. VIII, Sec. 2362, p. 737.

[4] *Allis-Chalmers Mfg. Co.* v. *City of Fort Pierce,* 323 F. 2d 233 (C.A. 5); *In re Sellers,* 32 F.R.D. 473 (N.D. Ill.); *Consolidated Edison Co. of New York v. Allis-Chalmers Mfg. Co.,* 217 F. Supp. 36 (S.D.N.Y.); *Herman Schwabe, Inc.* v. *United Shoe Machinery Corp.,* 194 F. Supp. 763 (D. Mass).

ported disclosure to the plaintiffs, so as to give them such equal access to necessary information.[8]

Petitioners rely on *United States* v. *Procter & Gamble Company, supra,* as contrary to the view that disclosure of grand jury material to one party in a case may warrant disclosure to the other party. In that case, the Court rejected the argument that the government's use of a grand jury transcript in the preparation of a civil case of itself entitled the civil defendant to disclosure. The point is, however, that the initial disclosure in *Procter & Gamble* was to the government pursuant to the first sentence of Rule 6(e) which provides for disclosure, without leave of court, "to the attorneys for the government for use in the performance of their duties", an authority which extends to government civil suits as well as criminal prosecutions. *United States* v. *General Electric Company,* 209 F. Supp. 197, 199 (E.D. Pa.); *In re Petroleum Industry Investigation,* 152 F. Supp. 646 (E.D. Va.).

Government counsel's knowledge of grand jury proceedings is inherent in the grand jury system and is

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[8] The claims of the treble-damage plaintiffs could have been satisfied by a specific grant of access to them, instead of an unsealing order. We believe that the general release of the document was justified, first, by the fact that the prior disclosure to defense counsel had not been limited by any condition (see Pet. App. 9, fn. 1) and, second, by the substantial number of damage suits which are pending or due to be filed against the corporate petitioners. In addition to the six suits below, actions have been instituted by a number of States and local governmental bodies. The necessary broad reach of access to private plaintiffs made it reasonable to vacate the sealing order.

in fact essential to the functioning of the system. But further disclosure to a private party is considered an initial public disclosure and must meet the test discussed by this Court in *Procter & Gamble*. In this case, however, secrecy had already been breached by the initial disclosure to petitioners' counsel. The further disclosure to the civil plaintiffs of the substance of the specific and identified material which had been disclosed to the defendants was therefore within the discretionary power of the trial court under Rule 6(e).

3. This result is strongly supported, as the court below noted, by the limited force of the policy of grand jury secrecy in the circumstances of this case. A number of the reasons for secrecy expired with the close of the criminal cases against petitioners. The primary remaining reasons—the encouragement of testimony by future grand jury witnesses and the protection of innocent persons mentioned in the grand jury testimony—have peculiarly little force on the facts of this case. While it is true that future witnesses would be deterred by knowledge that their testimony might be disclosed, this policy is particularly concerned with disclosure to the criminal defendants themselves. *Pittsburgh Glass Company* v. *United States*, 360 U.S. at 399. Since the defendants in the present case had already enjoyed access to the government memorandum, this reason for secrecy was of limited significance. Moreover, the Ninth Circuit took steps to assure that the anonymity of grand jury witnesses was protected by making appropriate dele-

tions from the government memorandum. As the court stated, this gave effect to "the policy considerations behind the rule of secrecy of grand jury investigations," while permitting disclosure of the document's substance (Pet. App. 8). Nor is there merit to petitioners' contention that the court ignored the rights of innocent persons who were mentioned in the grand jury testimony but exonerated in the investigation. The government memorandum was drafted for the purpose of advising the court on the sentencing of those persons and corporations which had been indicted and convicted. There is no reason whatever to believe that persons exonerated are identified in the document, especially after the deletions made by the court of appeals.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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